Supreme Court, U.S.
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No. 01-488

IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Arizona's capital sentencing statutory scheme, under which, according to the Arizona Supreme Court, the maximum "punishment allowed by law on the basis of the verdict alone is life imprisonment" and "[i]t is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death" (Pet. App. 25a), contravenes the right to jury trial guaranteed by the Sixth Amendment and made applicable to the States through the Fourteenth Amendment.

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OPINIONS BELOW

The opinion of the Arizona Supreme Court (Pet. App. 1a-44a) is reported at 25 P.3d 1139 (Ariz. 2001). The judgment of the Superior Court of Maricopa County (Pet. App. 45a-53a), is unreported.

STATEMENT OF JURISDICTION

The judgment of the Arizona Supreme Court was entered on June 20, 2001. The petition for a writ of certiorari was filed on September 18, 2001, and granted on January 11, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

> the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Arizona law, Ariz. Rev. Stat. Ann. §§ 13-703 and 13-1105 (West 2001), are set forth at Pet. App. 54a-61a.[1]

STATEMENT OF THE CASE

This case raises the question of whether the right to jury trial, guaranteed by the Sixth and Fourteenth Amendments, is violated by the Arizona statutory scheme for sentencing of a defendant found guilty of first degree murder, under which, according to the Arizona Supreme Court, the maximum "punishment allowed by law on the basis of the verdict alone is life imprisonment" and "[i]t is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death." Pet. App. 25a (*citing* Ariz. Rev. Stat. Ann. § 13-703(B)).

This Court upheld the Arizona capital sentencing scheme in *Walton v. Arizona*, 497 U.S. 639 (1990). However, this Court later ruled, in *Apprendi v. New Jersey*, 530 U.S. 466

1. In 2001, Ariz. Rev. Stat. Ann. § 13-703 was amended to add a new subsection B, which prohibited the execution of mentally retarded defendants. 2001 Ariz. Laws, ch. 260, § 1. The subsequent statutory subsections were renumbered accordingly. *See* Ariz. Rev. Stat. Ann. § 13-703 (West Supp. 2001) (historical and statutory notes). Because the opinion of the Arizona Supreme Court in this case refers to the version of § 13-703 as it existed before the 2001 amendment, this brief also cites to that version.

(2000), that the Sixth and Fourteenth Amendments require a jury to find, beyond a reasonable doubt, any fact that would "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id.* at 494. While conceding that *Apprendi* and *Jones v. United States*, 526 U.S. 227 (1999), "raise some question about the continued viability of *Walton*" (Pet. App. 23a), the Arizona Supreme Court rejected petitioner's claim that *Apprendi* had overruled *Walton*, holding that such a determination was solely the province of this Court. Pet. App. 27a.

A. Under Arizona law, if a jury returns a guilty verdict in a first degree murder case, the judge must conduct a hearing – in the absence of the jury – to determine whether the defendant is eligible for the death penalty. Ariz. Rev. Stat. Ann. § 13-703(B) (Pet. App. 54a-55a). For the death penalty to be imposed, the judge must find that the State has proved at least one of ten statutory aggravating factors beyond a reasonable doubt. Pet. App. 26a.[2] The Arizona Supreme Court has authoritatively interpreted the Arizona statute to mean that, as a matter of state law, "a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings." Pet. App. 25a.

2. Aggravating factors include: (i) that the defendant committed a previous offense (Ariz. Rev. Stat. Ann. § 13-703(F)(1), (F)(2)), (ii) that the defendant knowingly created a grave risk of death to persons other than the decedent (§ 13-703(F)(3)), (iii) that the defendant procured the commission of the offense by payment (§ 13-703(F)(4)), (iv) that the defendant committed the offense in expectation of the receipt of anything of pecuniary value (§ 13-703(F)(5)), (v) that the defendant committed the offense in an especially heinous, cruel or depraved manner (§ 13-703(F)(6)), (vi) that the defendant committed the offense while incarcerated or on parole (§ 13-703(F)(7)), (vii) that the defendant has been convicted of other homicides committed during the commission of the offense in question (§ 13-703(F)(8)), (viii) that the defendant was an adult at the time of the offense and the victim was under fifteen or over seventy (§ 13-703(F)(9)), and (ix) that the victim was an on duty peace officer (§ 13-703(F)(10)). Pet. App. 57a-58a.

Rather, under Ariz. Rev. Stat. Ann. § 13-703(B), the court alone makes all factual determinations as to whether any of the listed aggravating circumstances exist. Pet. App. 25a. At the post-trial hearing, the State may present, and the judge may consider, evidence never heard by the jury. Ariz. Rev. Stat. Ann. § 13-703(C) (Pet. App. 55a-56a). If the judge does not find at least one aggravating factor, the defendant may only be sentenced to life imprisonment. Pet. App. 26a. "[T]he death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present." *Id.* If the judge finds an aggravating circumstance, he must next determine whether there are mitigating circumstances. Ariz. Rev. Stat. Ann. § 13-703(E) (Pet. App. 56a). If he finds mitigating circumstances, the judge "must then weigh them against the aggravators and decide by 'special verdict' whether a death sentence is appropriate." Pet. App. 26a. *See* Ariz. Rev. Stat. Ann. § 13-703(D), (E) (Pet. App. 56a).

B. An Arizona Superior Court jury found petitioner guilty of felony first degree murder, based on circumstantial evidence of his participation in the planning of a robbery of an armored van in which the van's driver was shot and killed. Pet. App. 7a. All twelve jurors found petitioner guilty of felony murder; the jury split six to six as to petitioner's guilt of premeditated murder. Pet. App. 46a.[3]

At the post-trial sentencing hearing before the judge, the State presented evidence in support of two claimed statutory aggravating circumstances: (1) that petitioner committed the offense as consideration for the receipt, or in the expectation of the receipt, of pecuniary gain; and (2) that petitioner committed the offense in an especially heinous, cruel or depraved manner. J.A. 32a; Pet. App. 8a. The State's chief

3. Petitioner was also convicted of conspiracy to commit armed robbery, armed robbery, burglary and theft. Pet. App. 2a.

witness at the sentencing hearing was an alleged accomplice to the charged crime, James Greenham, who offered testimony the trial jury never heard.[4] Greenham testified that petitioner led the planning of the robbery, shot the armored van's driver, and subsequently asked to be "congratulated" on his shot. J.A. 40a, 41a, 64a-65a.[5]

After the hearing, the trial judge returned a "special verdict" pursuant to Ariz. Rev. Stat. Ann. § 13-703(D), finding both claimed statutory aggravating circumstances. Pet. App. 45a-53a. In so finding, the trial court rejected petitioner's vigorous attack on Greenham's credibility:

> The Court is mindful in determining the facts . . . that Mr. Greenham's credibility as a witness is an issue and that Mr. Greenham's testimony regarding the statement is uncorroborated. The Court has had occasion to observe Mr. Greenham while testifying and accordingly to assess his believability concerning whether the Defendant in fact made the statement attributed to him above. The Court has considered Mr. Greenham's demeanor while testifying along with all the other evidence in the case and resolves that Mr. Greenham is credible . . .

Pet. App. 50a. *See also* J.A. 70a-108a. The judge also rejected petitioner's contentions that Greenham was the shooter and

4. Greenham, who did not testify at trial, entered into a plea bargain after the jury verdict. J.A. 37a-38a, 76a-77a.

5. The other two witnesses at the sentencing hearing were experts who had testified at trial as to various aspects of the victim's wounds. Each was called to clarify issues presented at trial and to report on additional testing and analysis performed since the trial. J.A. 115a-119a.

that petitioner was not shown to have been at the scene of the robbery. Pet. App. 52a.[6]

After finding the two statutory aggravating factors, the trial judge went on to consider potential mitigating circumstances. The judge found no statutory mitigating factors and only one non-statutory mitigating factor – petitioner's lack of a prior criminal record. Pet. App. 51a-53a. Holding that there were "no mitigating circumstances sufficiently substantial to call for leniency," the trial court sentenced petitioner to death. Pet. App. 53a.

C. Arizona law provides for an automatic appeal to the State Supreme Court in all death sentence cases. Ariz. Rev. Stat. Ann. § 13-703.01 (West 2001). Petitioner argued on appeal that Arizona's capital sentencing scheme violated the Sixth and Fourteenth Amendment principles articulated in *Jones* and *Apprendi* by removing from the jury the determination of the facts necessary to allow the imposition of the death penalty. Pet. App. 23a. The State countered that *Walton* was "still the controlling authority on point." *Id.*

Since this Court had "refrained from overruling *Walton*" in *Apprendi*, the Arizona Supreme Court felt "bound" to reject petitioner's argument. Pet. App. 26a-27a. However, because *Jones* and *Apprendi* raised "some question about the continued viability of *Walton*" (Pet App. 23a), the Arizona Supreme Court proceeded to set forth a "further explication"

6. The trial court also held that petitioner was "the one who killed" the van driver, was a "major participant in the armed robbery," and acted with "a reckless disregard for human life." Pet. App. 47a. Since petitioner had been convicted only of felony murder, these findings were necessary under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), to allow imposition of the death penalty consistent with the requirements of the Eighth and Fourteenth Amendments.

of "the practical operation of Arizona's death penalty scheme, as applied under the peculiar facts of the present case." Pet. App. 24a.

The Arizona Supreme Court began by examining *Apprendi*'s attempted distinction of *Walton*. The Court noted that *Apprendi* had described the Arizona capital sentencing scheme at issue in *Walton* as one that "merely 'requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death,' and not as a system that 'permits a judge to determine the existence of a factor which makes a crime a capital offense.'" Pet. App. 24a (*quoting Apprendi*, 530 U.S. at 496-97). The Court also noted that Justice O'Connor had dissented from this characterization of Arizona law, describing as "'demonstrably untrue'" the notion that in Arizona "'the jury makes all of the findings necessary to expose the defendant to a death sentence.'" Pet. App. 25a (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)).

The Arizona Supreme Court then confirmed that, as a matter of state law, the Arizona capital sentencing scheme was "precisely as described in Justice O'Connor's dissent – Defendant's death sentence required the judge's factual findings." Pet. App 26a. The Court explained that, contrary to the *Apprendi* dictum, under Arizona law the maximum "punishment allowed by law on the basis of the verdict alone" is life imprisonment, and that "[i]t is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death." Pet. App. 25a (*citing* Ariz. Rev. Stat. Ann. § 13-703(B)); *see also* Pet. App. 26a ("when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present").

The Arizona Supreme Court then made plain, both as a matter of state law and as a matter of fact, that petitioner could not have been sentenced to death under Arizona law based on the evidence at trial. It started from the premise that the evidence adduced at trial "only proved that Defendant helped plan the robbery. None of it, however, linked Defendant to the act of killing [the driver]." Pet. App. 28a. As the Court explained:

> Although the trial evidence established Defendant's participation in planning the robbery and his further participation in concealing the proceeds from the crime, it provided almost nothing about why [the driver] was killed or who carried out the murder. There also was no evidence at trial to establish even reckless indifference. For all we know from the trial evidence, Defendant did not participate in, plan, or even expect the killing. This lack of evidence no doubt explains why the jury found Defendant guilty of felony, but not premeditated, murder.

Pet. App. 29a.

Nonetheless, the Arizona Supreme Court upheld petitioner's death sentence, relying on the testimony presented by Greenham at the sentencing hearing. Under Arizona's statutory scheme, "[w]hen imposing sentence in a capital case, the trial judge does not rely exclusively on the evidence admitted at trial but also takes into consideration the evidence presented at the sentencing hearing." Pet. App. 29a. The Court found that Greenham's sentencing hearing testimony supported the trial judge's finding that petitioner had "planned on robbing an armored car," had "taken the role as leader" and had "shot" the driver.

Pet. App. 29a.[7] Expressly citing Greenham's testimony, the Supreme Court therefore upheld the trial court's finding of at least one aggravating factor – that the murder was done for pecuniary gain. Pet. App. 34a.[8] Based on that conclusion, and finding that "the mitigating evidence is not sufficient to call for leniency" (Pet. App. 38a), the Supreme Court upheld petitioner's death sentence. Pet. App. 40a.[9]

SUMMARY OF ARGUMENT

I.

Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Sixth and Fourteenth Amendments require a jury to find, beyond a reasonable doubt, any fact that would "expose the

7. The Arizona Supreme Court relied entirely on the Greenham testimony to uphold the trial court's *Enmund/Tison* findings. Pet. App. 27a-29a.

8. Under Arizona law, "[a] murder committed in the context of a robbery or burglary is not per se motivated by pecuniary gain." *State v. Sansing*, 26 P.3d 1118, 1124 (Ariz. 2001). Rather, "the State must prove beyond a reasonable doubt that pecuniary gain was a motive, cause or impetus for the murder and not merely the result of the murder." *Id.* (internal quotation marks omitted). "Whether the needed connection exists between expected pecuniary gain and the motive for killing involves a highly fact-intensive inquiry." *Id.* at 1125. The jury in this case was not instructed to, and therefore did not make, any findings with respect to the pecuniary gain issue. *See* J.A. 17a-30a (jury instructions).

9. The Arizona Supreme Court held, however, that the second aggravating factor found by the trial court (that the murder was committed in a heinous or depraved manner) was not established by the record. The Court concluded that, even accepting the factual validity of Greenham's testimony about petitioner's alleged post-crime bragging, those comments did not meet the legal definition of heinous or depraved. Pet. App. 29a-33a.

defendant to a greater punishment than that authorized by the jury's verdict." *Id.* at 494. The Arizona capital sentencing scheme falls afoul of the *Apprendi* rule. The maximum punishment allowed by the jury's verdict under state law was "imprisonment for 'natural life' without the possibility of release." Pet. App. 25a. For a defendant to receive the plainly "greater punishment" of death, Arizona law requires the trial judge to make a factual finding after a post-verdict sentencing hearing that at least one of ten statutory "aggravating" factors is present. "[T]he death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present." Pet. App. 26a.

The State's attempted distinctions of *Apprendi* are unavailing. The State suggests that a trial judge may find the critical facts that allow a death sentence because death is within the "range" of sentences allowed for first degree murder in Arizona. Resp. Br. in Opp. 9. But this argument misapprehends the holding in *Apprendi*, under which the relevant inquiry is whether a factual finding exposes a defendant to a greater sentence than that allowed by the *jury's verdict alone*. *See Apprendi*, 530 U.S. at 494. Under Arizona law, petitioner's death sentence was not possible by virtue of the jury verdict alone, but instead was imposed because of factual findings made entirely by the trial judge. Pet. App. 28a-34a.

Nor can *Apprendi* be distinguished on the ground that the Arizona statutory "aggravating" circumstances are "sentencing factors," rather than "elements" of the crime. *Apprendi* expressly rejects this argument, holding that the "relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. The opinion below makes clear that factual findings made by a judge exposed petitioner to a greater punishment than that allowed under Arizona law by the jury's guilty verdict alone.

The Arizona Supreme Court felt bound to uphold petitioner's death sentence in light of *Walton v. Arizona*, 497 U.S. 639 (1990), since *Apprendi* refrained from expressly overruling *Walton*. But it is now clear that *Walton* is no longer viable. In discussing *Walton*, *Apprendi* suggested in dictum that the Arizona capital sentencing scheme merely "requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death," and does not "permit[] a judge to determine the existence of a factor which makes a crime a capital offense." *Apprendi*, 530 U.S. at 496-97 (internal quotation marks omitted). But the Arizona Supreme Court has now characterized as "'demonstrably untrue'" the claim that "'in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence.'" Pet. App. 25a (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)). Rather, the Court made plain that it is the judge's factual finding that subjects the defendant to a death sentence under Arizona law, a holding that places this case squarely under the *Apprendi* rule.

In any event, wholly apart from the Arizona Supreme Court's authoritative construction of state law, the core Sixth Amendment principles articulated in *Apprendi* make plain that *Walton* can no longer stand. The right to trial by jury simply has "no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (emphasis in original). Thus, even if under Arizona law the jury verdict could somehow be construed to make petitioner "eligible" for a death sentence, the same result would nonetheless obtain. The Sixth Amendment right to jury trial entitles a defendant to have a jury, not a judge, find all facts necessary for the imposition of the maximum sentence allowed by law. Arizona's capital sentencing scheme denied that right to petitioner, and his sentence therefore cannot stand.

II.

No exception should be carved out of the constitutional rule announced in *Apprendi* for death penalty cases. The historical understanding that underlies *Apprendi* applies with full force to capital sentencing. It was well understood at the time the Sixth Amendment was adopted that a jury was required to find the facts necessary to subject a criminal defendant to the maximum sentence allowed by law. The practice with respect to capital homicide was identical – a jury was required to determine whatever facts were necessary under the applicable state law to subject a defendant to a sentence of death.

The Sixth Amendment's guarantee of a jury trial is not rendered inapplicable here merely because Arizona, like many other States, has reacted to this Court's Eighth Amendment jurisprudence by requiring the finding of specific "aggravating" factors in order to impose a death sentence. Viewed in its historical context, this recent redefinition of capital homicide is nothing new; the process of adding to the quantum of facts necessary to allow capital punishment has continued throughout the common law and this Nation's history. Nothing in that process – or the most recent changes made by some States to the definition of capital murder – undermines the core guarantee of the Sixth Amendment that a jury must find whatever facts the State deems necessary to subject a defendant to the maximum sentence allowed by law.

Indeed, any separate rule for capital cases would lead to unjustifiable results. The States are free to adopt capital sentencing systems in which aggravating factors are "contained in the definition of the crime or in a separate sentencing factor (or in both)." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Under respondent's test, a State that chose to set forth a specific factor defining capital homicide

(for example, the murder of a witness in order to prevent his testimony) in its technical definition of the crime would be required to prove that "element" to a jury beyond a reasonable doubt before imposing a death sentence. In another State that made the identical fact a sentencing "aggravating factor," respondent's approach would allow the defendant to be sentenced to death solely on the basis of a judge's factual finding. *Apprendi* rejects the notion that the Sixth Amendment right to jury trial applies differently to identical factual findings depending on the happenstance of when in the proceedings they occur, focusing instead on the practical effect of the finding – whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494.

Contrary to the State's suggestion, *Apprendi* does not require "jury sentencing" or deprive the states of the ability effectively to administer capital punishment. *Apprendi* requires only that a jury find the facts necessary to subject a defendant to the maximum sentence allowed by law; a judge may thereafter impose a sentence on the basis of those facts and whatever other considerations are relevant under the law. *Apprendi*, 530 U.S. at 481. Twenty-nine of the thirty-eight states that authorize the death penalty for some form of homicide – and the United States – now have systems under which the jury is directed to find the "aggravating circumstances" necessary to allow capital punishment. It is thus entirely possible to have a constitutional capital sentencing system that allows for the exercise of discretion by the trial judge, and at the same time complies with *Apprendi*'s requirement that a jury find the facts that subject the defendant to the maximum sentence allowed by law.

ARGUMENT

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held unconstitutional a statutory sentencing scheme that allowed factual findings made solely by a judge to "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494. This case is controlled by both the language and logic of *Apprendi*. Arizona law, as authoritatively interpreted by the State's Supreme Court, allowed petitioner to be sentenced to death solely on the basis of factual findings made by a judge. Capital punishment was, as a matter of state law, not available on the basis of the jury's verdict alone. But even in the absence of the "explication" of Arizona law in the opinion below, the same result would obtain. Because the Sixth Amendment right to jury trial "means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury," *id.* at 499 (Scalia, J., concurring (emphasis in original)), petitioner's death sentence cannot stand.

I. THE ARIZONA CAPITAL PUNISHMENT SENTENCING SCHEME VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. *Apprendi* involved a New Jersey defendant who pleaded guilty to possession of a firearm for illegal purposes, a crime punishable under state law by a maximum term of ten years. *Apprendi*, 530 U.S. at 469-70. However, relying on New Jersey's "hate crime" law, which permitted an "extended term" of imprisonment when certain defendants act with a racially biased purpose, the sentencing court imposed a term of imprisonment of twelve years on the firearms charge. *Id.* at 470-71. The defendant contended that the imposition of the increased prison term on the basis of factual findings by the trial judge violated the Fourteenth Amendment.

In considering that claim, this Court began from the fundamental principle that a criminal defendant is entitled under the Sixth and Fourteenth Amendments to a trial by jury in which a guilty verdict must be premised on proof beyond a reasonable doubt. The Court then noted that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Id.* at 478 (footnote omitted). The "historic link between verdict and judgment," *id.* at 482, and the traditional inability of a judge to impose a sentence outside "the range of sentencing options prescribed by the legislature," *id.* at 481, highlighted the constitutional "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83 (emphasis in original).

The Court therefore held, as it had suggested the previous Term in *Jones*, that the Sixth and Fourteenth Amendments required a jury to find, beyond a reasonable doubt, any fact that would "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id.* at 494. Since the finding of racial motivation by the *Apprendi* trial judge had precisely that effect, the defendant's sentence could not stand.

In so holding, this Court expressly rejected the argument that *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), required a different result. Rather, the Court limited the holding of *McMillan* "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi*, 530 U.S. at 487 n.13. In such cases, a finding by a judge of a "sentencing factor" could be the basis of a punishment

decision. In all other cases, however, the issue was not whether a particular fact could be technically called a "sentencing factor" or an "element" of the offense. "[T]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. *See also id.* at 499 (Scalia, J., concurring) (the Sixth and Fourteenth Amendment right to jury trial "means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury") (emphasis in original); *id.* at 521 (Thomas, J., concurring) (the right to jury trial mandates that a fact must be found by a jury beyond a reasonable doubt if it is "by law the basis for imposing or increasing punishment").

B. The opinion of the Arizona Supreme Court makes clear that this case fits squarely within the *Apprendi* rule:

> In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for "natural life" without the possibility of release.

Pet. App. 25a. Rather, under Arizona law, a defendant can receive a death sentence only if the trial judge makes the factual finding that at least one of the statutory aggravating factors in Ariz. Rev. Stat. Ann. § 13-703 (Pet. App. 54a-60a) is present. Pet. App. 26a. If the trial judge so finds, he must then determine whether there are any mitigating circumstances. *Id.* If so, he must weigh those mitigating circumstances against any aggravating factors in deciding whether to impose the death penalty.

In short, the opinion below confirmed that Arizona law is "precisely as described in Justice O'Connor's [*Apprendi*] dissent – Defendant's death sentence *required* the judge's factual findings." Pet. App. 26a (emphasis added).[10] This is thus the paradigm of a case where the factual findings made by a judge, not a jury, "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494. *Apprendi* teaches that such a regime violates the Sixth Amendment.

C. The State's primary argument is that *Apprendi* is inapplicable because death is within the "range" of sentences for felony first degree murder in Arizona under Ariz. Rev. Stat. Ann. § 13-1105(C).[11] Resp. Br. in Opp. 9. This argument fails.

The definitive interpretation by the Arizona Supreme Court of the relevant statute is directly to the contrary. Ariz. Rev. Stat. Ann. § 13-1105(C) does *not* simply provide that first degree murder is punishable by a range of sentencing from life to death. Instead, as the final phrase in the statute makes plain, death is only available as a sentence "*as provided by § 13-703.*" Pet. App. 61a (emphasis added). That statute, in turn, only allows the imposition of a death

10. *See Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting) (decrying as "demonstrably untrue" any claim that "in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence." Rather, "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.")

11. Ariz. Rev. Stat. Ann. § 13-1105(C) provides that "First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703." Pet. App. 61a.

sentence when a *judge* finds one or more statutory aggravating circumstances. Pet. App. 54a-60a. The Arizona Supreme Court made the point as clearly as possible: "The range of punishment allowed by law on the basis of the verdict alone [i.e., the conviction of first degree murder] is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of release." Pet. App. 25a. *See Stringer v. Black*, 503 U.S. 222, 234-35 (1992) (state supreme court's view as to the meaning of its own capital punishment law is conclusive); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (Supreme Court bound by state supreme court's interpretation of its homicide statute).

The Arizona statutory scheme is thus in substance no different from that in *Apprendi*, where the jury's verdict confronted the defendant with at most ten years in prison for the weapons violation, and the more lengthy sentence was possible only when a judge found the existence of an "aggravating" factor – racial motivation. Just as the New Jersey defendant had formal statutory notice in *Apprendi* that he might be subjected to a term of twenty years if a judge found that his offense was a "hate crime," petitioner had formal statutory notice that he might be subjected to a death sentence if a judge found the presence of an "aggravating" factor. But *Apprendi* does not turn on such niceties of statutory "notice." Instead, it holds that the Sixth Amendment right to jury trial necessarily encompasses the right to have a jury find, beyond a reasonable doubt, those facts that allow an increase in a sentence beyond that allowed by the jury verdict alone.

In the end, the State is reduced to arguing that the statutory aggravators in Ariz. Rev. Stat. Ann. § 13-703 are "sentencing factors," and not "elements" of first degree murder. Resp. Br. in Opp. 8. But, as noted above, *Apprendi* eschews such an approach, holding that the "relevant inquiry

is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.[12] The concurring opinions put the point even more forcefully, declaring "that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury," *id.* at 499 (Scalia, J.), and that "[i]f a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element." *Id.* at 521 (Thomas, J.). The finding of an aggravating factor – which was necessary to increase petitioner's sentence from life to death – thus plainly falls within the *Apprendi* rule.[13]

The only remaining possible difference between this case and *Apprendi* is that New Jersey codified the "hate crime" aggravator in a different statute from the one defining the underlying crime. As an initial matter, it should be noted that Arizona has done much the same. While Ariz. Rev. Stat. Ann. § 13-1105(C) provides that first degree murder is punishable by "death or life imprisonment," it goes on to

12. Every federal court of appeals to address the issue in the context of the federal drug-trafficking statute has declined to read *Apprendi* in the fashion suggested by the State. These courts have held that a jury must determine the drug quantities necessary to subject a defendant to the applicable maximum sentence under 21 U.S.C. § 841 (LEXIS through Pub. L. No. 107-136). *See United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001) (*en banc*) (collecting cases), *petition for cert. filed*, No. 01-6398 (U.S. Sep. 20, 2001); *United States v. Vazquez*, 271 F.3d 93, 98-99 (3d Cir. 2001) (*en banc*); *United States v. Thomas*, 274 F.3d 655, 662-63 (2d Cir. 2001) (*en banc*).

13. Justice O'Connor, while dissenting in *Apprendi*, recognized as much: "In real terms . . . the Arizona sentencing scheme removes from the jury the assessment of a fact that determines whether the defendant can receive [the death sentence]." *Apprendi*, 530 U.S. at 541 (dissenting opinion).

state "as provided by § 13-703" (Pet. App. 61a); different parts of the state code thus define first degree murder and the aggravating factors necessary for the greater sentence. This is precisely the New Jersey statutory scheme involved in *Apprendi*. But more importantly, since *Apprendi* warns that the inquiry is one of substance, not of form, this is a distinction without a difference.[14] *Jones* makes the same point. Although the federal carjacking statute at issue in that case included a range of sentences in a single code provision, this Court construed the law to set forth three separate offenses, in order to avoid the very constitutional question posed in *Apprendi*. *Jones*, 526 U.S. at 251-52.

D. The Arizona Supreme Court was constrained to affirm petitioner's death sentence because of *Walton v. Arizona*, 497 U.S. 639 (1990), which had upheld Arizona's capital punishment scheme against a Sixth Amendment attack. Pet. App. 27a. It is plain, however, that in light of *Apprendi*, *Walton* no longer withstands scrutiny.

Indeed, even before *Apprendi*, *Jones* presaged the demise of *Walton*. At least one member of the Court suggested in *Jones* that while it was not necessary in that case to decide the continued vitality of *Walton*, the latter "should be

14. *See Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting):

> The only difference, then, between the Arizona scheme and the New Jersey scheme we consider here – apart from the magnitude of the punishment at stake – is that New Jersey has not prescribed the 20-year maximum penalty in the same statute that it defines the crime to be punished. It is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

See also id. at 543 (suggesting that the constitutional principle in *Apprendi* must therefore be "more far reaching").

reconsidered in due course." *Jones*, 526 U.S. at 253 (Stevens, J., concurring). The *Jones* majority, likewise, emphasized that a "careful reading of *Walton*'s rationale" was necessary to avoid serious constitutional questions. *Id.* at 251. *See also id.* at 272 (Kennedy, J., dissenting) (noting that *Walton* was "a better candidate" for the application of the rule announced in *Jones*).

Apprendi suggested in dictum that *Walton* could be distinguished because the Arizona system merely "requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death," and did not "permit[] a judge to determine the existence of a factor which makes a crime a capital offense." *Apprendi*, 530 U.S. at 496-97 (internal quotation marks omitted). But such a characterization of the Arizona system is no longer possible. The opinion of the Arizona Supreme Court quoted directly from Justice O'Connor's dissent, which characterized as "'demonstrably untrue'" the claim that "'in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence.'" Pet. App. 25a (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)). The state court concluded that Justice O'Connor's description of Arizona law was precisely correct – the maximum sentence available on the basis of the jury verdict is life. Pet. App. 26a. Thus, it can simply no longer be contended that an Arizona trial judge is merely exercising a "choice between a greater and a lesser penalty," *Jones*, 526 U.S. at 251, in imposing a death sentence. Rather, the death sentence becomes a possibility under Arizona law only if the judge finds the requisite aggravating factors; if the judge does not, death is not within the range of permissible sentences. Pet. App. 25a.

Indeed, even the *Apprendi* dissenters did not contest this point; all joined Justice O'Connor's conclusion that *Walton* cannot be effectively distinguished. *Apprendi*, 530 U.S. at

538-39 (O'Connor, J., dissenting, joined by the Chief Justice, Kennedy, J., and Breyer, J.). *See also id.* at 537 (O'Connor, J., dissenting). ("If a State can remove from the jury a factual determination that makes the difference between life and death . . . it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence"); *Jones*, 526 U.S. at 272 (Kennedy, J., dissenting) ("If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death").[15] Now that the Arizona Supreme Court has removed any doubt that the majority's suggested distinction fails, there is simply no basis for continued adherence to *Walton*.

E. While the authoritative interpretation of state law by the Arizona Supreme Court makes plain that petitioner's death sentence violates the Sixth Amendment, the same result would obtain even in the absence of the detailed "explication" of Arizona law provided by the opinion below. *Walton* is flatly inconsistent with the basic Sixth Amendment principles confirmed in *Apprendi*. As Justice Scalia emphasized, the guarantee of jury trial in the Sixth Amendment necessarily includes "the right to have a jury determine those facts that determine the maximum sentence the law allows." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring). The right to trial by jury simply has "no intelligible content unless it means that

15. *See also* Brief of the United States in *Apprendi v. New Jersey*, No. 99-478, 2000 WL 194804, at *24 (Feb. 14, 2000) ("It would be a strange constitutional regime that permitted [judges to make findings essential before a defendant may be sentenced to death], yet precluded a legislature from specifying a statutory enhancement factor that raised the sentencing range available to a judge in imposing a term of imprisonment").

all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Id.* (emphasis in original).

In the end, therefore, the relevant inquiry is not whether state law makes a defendant "eligible" for a death sentence after a jury verdict. The question instead is whether a jury has found all facts necessary under state law to subject the defendant to the imposition of a particular sentence. However the effect of the jury's guilty verdict is characterized as a matter of Arizona law, it is indisputable that the trial judge, not the jury, found the facts necessary to permit the imposition of capital punishment. That procedure violates the Sixth Amendment, and since *Walton* holds otherwise, it is plainly vitiated by *Apprendi*.[16]

16. To the extent that *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), suggest that a death sentence may be imposed solely on the basis of factual findings made by a judge, they are also inconsistent with the rule in *Apprendi*. *But see Spaziano*, 468 U.S. at 458 (noting that the "fundamental premise" of petitioner's argument in that case was that the "capital sentencing decision is one that, in all cases, should be made by a jury," and that petitioner did not urge "that capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court's decision in *Duncan v. Louisiana*"); *Jones*, 526 U.S. at 250-51 (noting that *Hildwin* "could not drive the answer to the Sixth Amendment question" posed by the Government's interpretation of the federal carjacking statute, since "[i]n *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved").

II. THE SIXTH AMENDMENT PRINCIPLES ARTICULATED IN *APPRENDI* APPLY TO CAPITAL SENTENCING.

Respondent suggests that capital punishment should somehow be excepted from the constitutional rule announced in *Apprendi*. Resp. Br. in Opp. 15-16. But nothing in the language of the Sixth Amendment authorizes such an exception. Indeed, it would be strange if the Sixth Amendment's jury trial guarantee protected a defendant against an increase of two years in the sentence allowed on the basis of the jury's findings alone, but provided no protection against an increase in the sentence allowed by such findings from life to death.[17]

In any event, there is no reasoned basis for a Sixth Amendment distinction between capital sentencing and sentencing for a term of years. *Apprendi* makes plain that if the State seeks the maximum punishment allowed by law for a crime – either a term of years or death – the jury must find all facts necessary to allow the imposition of that punishment. Therefore, the "aggravating" factors necessary to a sentence of death in Arizona must be found by the jury.

A. *Apprendi* rests upon the settled historical understanding of the right to jury trial embodied in the Sixth Amendment, and the notion that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478 (footnote omitted). The State does not contend, nor could it, that the understanding of the Framers differed

17. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.")

in any way between crimes involving punishment for a term of years and those involving capital punishment.

It was well understood both in the common law and at the time of the adoption of the Sixth Amendment that a jury's guilty verdict with respect to the crime of capital homicide included within it all factual findings necessary to allow the imposition of a death sentence. When the right to jury trial first became entrenched in England in the thirteenth century, all forms of culpable homicide were capital offenses. *See* Thomas A. Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800 30 (1985). Thus the jury's verdict of guilt in any homicide case established all facts necessary to subject the defendant to a sentence of death.

Over the ensuing centuries, the common law refined the definition of capital homicide, by requiring the finding of additional facts as a prerequisite to the imposition of a death sentence. Simple homicide, or "manslaughter," was distinguished from capital homicide, or "murder," and the death penalty was only available for the latter. *Id.* at 122. A defendant could not be convicted of "murder" and sentenced to death unless the indictment specified – and the jury found beyond a reasonable doubt – the additional fact of "malice aforethought." *See* 2 J. Bishop, New Commentaries on The Criminal Law ("Bishop") § 726(3) (8th ed. 1892); American Law Institute, Model Penal Code and Commentaries (1980) ("MPC") § 210.2, Commentary pp. 13-14. Thus, the increase in the quantum of facts necessary to establish capital murder had no effect on the underlying right to trial by jury.

By 1791, when the Sixth Amendment became law, the right of the jury to make the factual determinations that would determine whether a defendant could be subjected to capital

punishment was "particularly well established." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 10 (1989).[18] *See also Walton*, 497 U.S. at 710-11 (Stevens, J., dissenting). The understanding of the Framers of the Sixth Amendment with respect to capital cases was thus precisely the same as their understanding with respect to cases involving lesser punishments. That understanding plainly precluded a "legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 482-83 (emphasis in original).[19]

B. Rather than question the historical record, the State seems instead to suggest that the Sixth Amendment guarantee of jury trial no longer applies to all facts necessary for the imposition of a death sentence, because some States have recently expanded that list of facts by adding so-called "aggravating" factors. Resp. Br. in Opp. 13-14. But neither the fact of such statutory amendments nor the States' motivations in enacting them take "aggravating" factors outside the guarantee of the right to jury trial.

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18. To the extent that they specifically addressed the jury's function in capital cases, Colonial and State laws of the period reflected an even *higher* valuation of the jury's function in such cases than in other cases, by giving capital defendants special rights to make challenges. *See* The Complete Bill of Rights 404, 408 (N. Cogan ed. 1997) (quoting colonial laws of New-Plimouth and New Jersey).

19. Indeed, the hotly-contested issue with respect to the proper scope of the jury's powers during this period was not whether the jury's historical *fact-finding* power could be infringed, but rather whether the jury should wield the power to find the *law* as well. *See* White, *supra*, at 11-14.

1. As noted above, the quantum of proof necessary to establish capital homicide changed throughout the common law. This process of change has continued in the United States since the founding of the Republic. Shortly after the Constitution was adopted, Pennsylvania in 1794 pioneered the division of murder into "degrees." Pennsylvania's statute defined capital "first-degree" murders as those "'perpetrated by means of poison, or by lying in wait, or by any kind of willful, deliberate or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary.'" MPC § 210.6, Commentary p. 123 (*quoting* Pa. Laws of 1794, ch. 257, §§ 1, 2). (Under the common law, any murder was treated as capital as long as it fell under the broad category of malice aforethought[20] or was committed in connection with any felony.[21]) The new Pennsylvania statute required the proof of additional facts – that the murder was committed either pursuant to a deliberate or premeditated scheme or in connection with specific enumerated felonies. *See* MPC § 210.6, Commentary p. 123; *see also* Jo Anne C. Adlerstein, *Felony-Murder in the New Criminal Codes*, 4 Am. J. Crim. L. 249, 251-52 (1975-76). But, while the Pennsylvania law effectively redefined capital murder, it did not affect the defendants' right to jury trial; the added facts were required to be found by the jury beyond a reasonable doubt in order to subject a defendant to a death sentence.[22]

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20. *See* MPC § 210.2, Commentary p. 14.

21. *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 7.5(a) (1986). There was no need to limit the felonies that would suffice to establish felony murder in the early common law, because at the time "all felonies were punishable by death, so it made little difference whether the felon was hanged for the felony or for the murder." *Id.* n.4.

22. *See, e.g., Commonwealth v. Hollinger*, 42 A. 548 (Pa. 1899) (jury instructed that "before they could convict of murder in the first degree they must be satisfied that the killing was willful, deliberate, and premeditated") (internal quotation marks omitted).

The approach of dividing murder into "degrees," only the highest of which was treated as capital, became predominant in nineteenth century America. *See* MPC § 210.6, Commentary pp. 123-24. But it was hardly the only change to the common law. Many States altered their definitions of first-degree murder, typically by adding to the set of factual findings necessary to subject a defendant to a death sentence. The "willful, deliberate or premeditated" formula introduced by Pennsylvania in 1794 eventually was recast into a variety of more or less elaborate *mens rea* requirements incorporated in State codes. *See* 2 LaFave & Scott, *supra*, § 7.7 n.36. Some States adopted felony murder rules different from Pennsylvania's, either by limiting capital murder to different enumerated felonies, or to "inherently dangerous" felonies, or by eliminating the rule altogether. *See id.* § 7.5; *see also* Adlerstein, *supra*, at 251-68. Some states then further refined their criminal codes by treating homicides as first degree murder upon proof of a number of more specific facts, such as that the victim was a police officer, that the murder was committed for pay, or that the killer had a prior murder conviction. *See* LaFave & Scott, *supra*, § 7.7 & nn.57-62.[23] But throughout this process of

23. The development of New York's first-degree murder statute between the mid-nineteenth century and the early 1970s provides an illustration of the sort of modifications and refinements that occurred. New York first enacted a law separating murder into two degrees, only one of which would be capital, in 1860. *See* James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 Alb. L. Rev. 515, 519 & n.23 (1990). After a portion of that statute was declared unconstitutional, the State enacted a revised version in 1862. *See id.* n.23. Twenty years later, the State made the definition of first-degree murder more specific by including references to premeditated, depraved mind, felony and arson homicides. *See id.* Fifteen years after that, the State added homicide by train wrecking to the definition. *See id.* In 1965, while leaving its definition of first degree murder intact, the State restricted capital punishment for such murders to cases in which the victim was an (Cont'd)

change, one thing appears to have remained constant: However the State chose to define capital murder, the facts deemed necessary to subject the defendant to the maximum penalty were found by the jury. *See* John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. Miami L. Rev. 643, 649-52, 660 (1990).[24]

This historical process of change has continued apace in the thirty years since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).[25] In order to comply with the Eighth Amendment, some States once again added to the quantum of facts needed to establish capital homicide, so as

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on-duty peace officer or the perpetrator was serving a life sentence. *See id.* at 525. Two years later, the State eliminated the degree structure, but retained the limitation of capital punishment to those two situations. *See id.* at 527. In 1971, the State added on-duty prison guards to the class of victims whose murder would be treated as capital. *See id.* at 528.

24. Indeed, among the forty-one jurisdictions that employed discretionary capital punishment at the time of *Furman*, even the two that permitted a death sentence to be imposed without the consent of a jury still required the jury to make all of the factual findings that would render the death penalty an available punishment. *See Spaziano*, 468 U.S. at 472 & n.8 (Stevens, J., concurring in part and dissenting in part) (*citing Witherspoon v. Illinois*, 391 U.S. 510, 525-27 & nn.2-8 (1968) (opinion of Douglas, J.)); Del. Code Ann., tit. 11, §§ 571, 3901 (West Supp. 1970) (death penalty available upon conviction of first degree murder but jury that convicts defendant can issue non-binding recommendation of mercy); Utah Code Ann. § 76-30-4 (1953) (same).

25. *See generally* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 397-430 (1998) (listing various additions of "aggravating factors" in State death penalty statutes over this period).

to provide a basis for reasoned distinctions among those defendants convicted of first degree murder.[26] However, the vast majority of States that did so entrusted the duty of finding these "aggravating" facts to the jury. *See* Poulos, *supra*, at 659-60.[27] Thus, the fact that States have recently changed their statutory definitions of capital murder, in and of itself, does not argue that the historical understanding of the jury trial guarantee in the Sixth Amendment has also somehow thereby been altered.

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26. Arizona's experience parallels the historical record of change. Arizona's first Penal Codes were copied almost in their entirety from the Penal Code of California (*see* Rev. Stat. of Ariz., 1913, Penal Code Preface), and included that State's Pennsylvania-style definition of first-degree murder, *see id.* § 172, and its specification that the penalty of death could be imposed for that crime "at the discretion of the jury trying the same." *Id.* § 173. Following a brief abolishment of the death penalty between 1916 and 1918 (see 1917 Ariz. Laws, Initiative and Referendum Measures, at 4-5; 1919 Ariz. Laws, Initiative and Referendum Measures, at 17-21), Arizona reenacted essentially the pre-existing provisions regarding first-degree murder and the death penalty, which remained virtually unchanged through 1973. *See* Rev. Code of Ariz., 1928 §§ 4584, 4585; Ariz. Code, 1939 §§ 43-2902, 43-2903. Arizona then adopted its most recent version of its capital murder statutes (based largely on the Model Penal Code). 1973 Ariz. Laws, ch. 138. Amendments enacted in 1977 and succeeding years have added definitions, altered the *mens rea* requirement, and modified the list of felonies that may establish felony murder. *See* 1977 Ariz. Laws, ch. 142; Ariz. Rev. Stat. Ann. § 13-1105 (West 2001) (historical and statutory notes).

27. As of 1990, only four States (Arizona, Idaho, Nebraska, and Montana) with post-*Furman* death penalty statutes had assigned the determination of whether aggravating circumstances existed entirely to the court. *Id. See also infra* nn.35-37 (twenty-nine of the thirty-eight States with death penalties (and the federal Government) currently assign fact-finding function as to existence of aggravating circumstances to jury; only five States assign such fact-finding entirely to the court).

2. The State's argument may be that the post-*Furman* additions to the list of facts defining capital murder in Arizona and other States are without the Sixth Amendment's guarantee of jury trial because they were primarily motivated by this Court's Eighth Amendment jurisprudence. *See* Resp. Br. in Opp. 13-17. However, the particular motivations for the most recent changes in the States' listing of the quantum of facts necessary to establish capital homicide provide no reasoned basis for distinguishing *Apprendi*.

While it may be assumed that the States have made many of these changes in their capital homicide statutes in order to comply with the Constitution, there is no logical reason why findings of fact required under these amended statutes are entitled to less Sixth Amendment weight than the findings required by the States for other reasons. Any rule to the contrary would mean that a defendant in one State would be entitled to a jury trial with respect to a fact that the State included within its definition before or after *Furman* of capital murder for any number of public policy purposes (such as whether the defendant knew the victim was a police officer), while a defendant in another State could be denied the right to jury trial because the latter State identified exactly the same fact as a "narrowing" factor in reaction to *Furman*, in order to assure that its death penalty statute complied with the constitutional prohibition against cruel and unusual punishment. Not only would such an approach lead to unjustifiable distinctions, it would embroil this Court in difficult State-by-State analyses as to whether a particular change in a State's definition of capital homicide was prompted by a desire to adhere to the Eighth Amendment, or by some other motivation.[28] Most disturbingly, the State's

28. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("it is virtually impossible to determine the singular 'motive' of a collective legislative body, and this Court has a long tradition of refraining from such inquiries") (internal citations omitted).

suggested distinction between capital cases and all others would treat changes to criminal statutes undertaken by the States to comply with their constitutional duties as somehow entitled to less Sixth Amendment import than those prompted by other reasons.

Nothing in the Sixth Amendment or *Apprendi* justifies such an approach. Rather, *Apprendi* rests on the core principle, fully understood by the Framers and embodied in the Sixth Amendment, that the guarantee of trial by jury includes the right to have a jury find all facts required by state law to subject the defendant to a particular punishment, including a sentence of death. There is simply no warrant in *Apprendi*, in history, or in logic, for treating the factual findings necessary to impose a sentence of death in a constitutionally different fashion from those that increase a possible term of imprisonment from ten to twelve years.[29] Whatever a State's particular motivation for its definition of capital murder, the facts necessary to allow the imposition of that sentence are required by the Constitution to be found by the jury.

C. We have responded above (*see* pp. 18-19, *supra*) to the State's argument that the Arizona aggravators are "sentencing factors," and therefore outside the protection of the Sixth Amendment; it is plain that *Apprendi* forecloses this argument. But it is also worth noting that this argument, if adopted, would create practical dysfunction and manifest unfairness in the administration of capital punishment.

Current state death penalty systems can be divided into at least two broad primary types. *See* James R. Acker and

29. The four *Apprendi* dissenters rejected any notion that the restrictions imposed by the Eighth Amendment on a state legislature's ability to define capital crimes should relegate capital defendants to different treatment under the majority's rule. *See Apprendi*, 530 U.S. at 539 (O'Connor, J., dissenting).

C.S. Lanier, *Capital Murder From Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death*, 29 Crim. L. Bull. 291, 298-302 (1993). The first type defines first degree murder generically and then limits death penalty eligibility to those convicted of that crime where the state can also prove at sentencing at least one statutory aggravating factor. *Id.* at 298-99. Such systems rely primarily on the sentencing process to narrow and define the group of defendants subject to the death penalty. *Id.* The Arizona system is an example of this type of scheme; Florida and Georgia are others.[30]

The second type of state capital system has more specific statutory definitions of "capital" murder. *Id.* at 300-01. Under these systems, the statutory distinction between capital murder and other first-degree murder begins the process of determining who may be subject to the death penalty. Texas is an example of this type of system. Texas law limits capital homicide to several specific types of aggravated criminal homicide.[31] The initial phase of the trial thus establishes the defendant's guilt of a potentially capital crime; in the post-verdict proceeding, the jury decides the issue of capital punishment by first answering two limited questions, and, when all are answered in the affirmative, then deciding whether sufficient mitigating circumstances exist to warrant a sentence of life rather than death.[32]

30. *See* Fla. Stat. § 921.141 (LEXIS through 2001 Legis. Sess.); Ga. Code Ann. § 17-10-30(b) (LEXIS through 2001 Ext. Legis. Sess. Gen. Assemb.).

31. *See* Tex. Penal Code Ann. § 19.03(a) (LEXIS through 1999 Legis. Sess.).

32. The questions are: (1) is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (2) did the defendant kill deliberately. *See* Tex. Crim. Proc. Code Ann. art. 37.071(2) (LEXIS through 2001 Legis. Sess.).

The States are free to choose either of these approaches, or some other variant. *See Tuilaepa*, 512 U.S. at 972 ("The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)."); *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988) (aggravating circumstances may be found "at either the sentencing phase of the trial or the guilt phase"). Under the pragmatic test articulated in *Apprendi*, a defendant has the right to trial by jury under any system chosen by the State with respect to the finding of statutory "aggravating circumstances," for "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

However, under the State's suggested approach, which distinguishes "elements" from "sentencing factors" purely on the basis of when in the proceeding the particular finding of fact is made, the defendant's Sixth Amendment right to jury trial would turn on a particular State's choice of capital punishment sentencing system. Thus, a defendant in Texas would have the right to jury trial with respect to a specified "element" of aggravated capital murder, while a defendant in another state which considered an identical "aggravating factor" only in the sentencing stage would be deprived of the right to jury trial.[33]

33. The Alabama and Delaware capital sentencing schemes provide an example of the problems with the rule urged by the State. Each State has chosen to include in the group of murder defendants who may be sentenced to death those who killed a witness to a crime for the purpose of preventing his appearance or testimony in any court proceeding involving that crime. *See* Ala. Code § 13A-5-40(a)(14) (LEXIS through 2001 Legis. Sess.); Del. Code Ann. tit. 11, § 4209(e)(1)(g) (LEXIS through 2001 Legis. Sess. 141st Gen. Assemb.). However, Alabama statutorily defines specific "capital offenses" (*see* Ala. Code § 13A-5-40(a)), while Delaware broadly

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There is no reason for this Court to adopt such an artificial constitutional construct. *Apprendi* teaches that however a relevant fact is formally denominated, whether as an "element" or a "sentencing factor," the Sixth Amendment right to jury trial obtains if that fact is necessary to allow a sentence greater than that possible on the basis of the jury's verdict alone.[34]

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defines first degree murder (*see* Del. Code Ann. tit. 11, § 636) and primarily defines death penalty eligibility through proof of aggravating circumstances at a sentencing hearing (*see id.* § 4209). Under the State's suggested construct, Alabama has defined killing of a witness as an "element" of one form of capital murder, while Delaware has defined killing of a witness as a "sentencing factor." The distinction would be critical for Sixth Amendment purposes, because in Delaware the court, not a jury, determines the existence of aggravating circumstances. *See* Del. Code Ann. tit. 11, § 4209(d). Thus, even though each State made an identical policy choice with respect to the inclusion of a factor among those which subject a defendant to a death sentence, the constitutional rights of defendants in the two States would be quite different under respondent's suggested approach.

34. The State also argues that Justice Thomas' *Apprendi* concurrence establishes that the rule of that case "likely" has no application to capital sentencing. Resp. Br. in Opp. 15. This argument, however, confuses *reserving* a question with *deciding* one. In fact, Justice Thomas urged an even "broader rule than the Court adopts" – that "[i]f a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element" of the crime and must be found by the jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 499, 521 (Thomas, J., concurring). As Justice Thomas noted, since *Walton* approved "a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment," *id.* at 522, it is facially inconsistent with his proposed rule. However, noting that this Court had constrained the States' ability automatically to impose a death penalty simply upon conviction of certain crimes,

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D. Finally, the State suggests that "broader consequences" somehow militate against application of the *Apprendi* ruling to capital punishment. Resp. Br. in Opp. 12. In large part, these supposed "consequences" simply do not exist; in any event, the argument provides no basis for excluding capital cases from the Sixth and Fourteenth Amendment principles articulated in *Apprendi*.

For example, the State cautions that if petitioner is successful, juries will be required to consider not only all statutory "aggravating factors," but also all mitigation evidence, and judges will be barred from imposing a lesser sentence than the statutory maximum. *Id.* But nothing in *Apprendi* requires such a result. Rather, the Sixth and Fourteenth Amendments only require that the jury *find* any fact (other than prior conviction) that is necessary to subject the defendant to the maximum prescribed statutory punishment. Nothing in *Apprendi* requires jury *sentencing* or prevents a State from granting discretion to a trial judge to impose less than the maximum possible sentence. *See Apprendi*, 530 U.S. at 481 ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute") (emphasis in original)); *id.* at 498 (Scalia, J., concurring) (a defendant may receive a sentence less than the maximum from a "tenderhearted judge").

The State next warns that the supposed benefits of judicial sentencing in capital cases will be lost in the absence of a special exception to the rule announced in *Apprendi*.

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Justice Thomas simply left for "another day" the question of "[w]hether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated." *Id.* at 523.

Resp. Br. in Opp. 13. To the extent that this argument rests on the State's misreading of *Apprendi* described above, no lengthy response is necessary. The States remain fully able under *Apprendi* to employ any number of models of judicial sentencing; what they are not free to do is to remove from the jury's fact-finding obligation those facts that will increase a sentence beyond that allowed by the verdict of guilt alone.

To the extent that the State is instead suggesting that there can be no rational or constitutional system of capital punishment when a jury performs its constitutionally mandated *Apprendi* fact-finding function (*see id.*), the argument is equally misplaced. Of the thirty-eight States that currently have the death penalty, twenty-nine require the jury to find the "aggravating circumstances" that allow capital sentencing.[35] Among the nine remaining jurisdictions,

35. *See* Ark. Code Ann. §§ 5-4-602 – 5-4-605 (LEXIS through 2001 legislation); Cal. Penal Code §§ 190.1 – 190.4 (LEXIS through 2001 Legis. Sess.); Conn. Gen. Stat. § 53a-46a (LEXIS through 2000 Legis. Sess.); Ga. Code Ann. §§ 17-10-30 – 17-10-31 (LEXIS through 2001 Ext. Legis. Sess.); 720 Ill. Comp. Stat. 5/9-1 (LEXIS through Public Act 92-34); Kan. Stat. Ann. §§ 21-4624 – 21-4626 (LEXIS through 2000 Supp.); Ky. Rev. Stat. Ann. § 532.025 (LEXIS through 2001 Legis. Sess.); La. Code Crim. Proc. Ann. arts. 905, 905.1 – 905.8 (LEXIS through 2001 Supp.); Md. Ann. Code art. 27, § 413 (LEXIS through 2001 Legis. Sess.); Miss. Code Ann. § 99-19-101 (LEXIS through 2001 1st Ext. Legis. Sess.); Mo. Rev. Stat. §§ 565.030, 565.032 (LEXIS through 1st Ext. Legis. Sess. 91st Gen. Assemb.); Nev. Rev. Stat. Ann. §§ 175.552, 175.554, 175.556, 175.558, 200.030, 200.033, 200.035 (LEXIS through 71st Reg. and 17th Spec. Legis. Sess. 2001) (*but see id.* § 175.556 (authorizing finding of aggravators by three-judge panel when jury is unable reach unanimous verdict)); N.H. Rev. Stat. Ann. § 630:5 (LEXIS through Ch. 297 2001 Sess. Gen. Ct.); N.J. Stat. Ann. § 2C:11-3 (LEXIS through N.J. 209th Legis., 2nd Ann. Legis. Sess. 2001); N.M. Stat. Ann. §§ 31-18-14, 31-20A-1, 31-20A-2, 31-20A-3 – 31-20A-6 (LEXIS through the 2nd Spec. Legis. Sess. 45th Legis.); N.Y. Penal
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only five fail to provide at least a recommendation or preliminary fact-finding role for the jury in capital sentencing.[36] Thus, any suggestion that only a system such as Arizona's (in which the jury is involved neither in fact-finding nor in sentencing) passes constitutional muster is an

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Law § 125.27 (LEXIS through Ch. 560, Dec. 12, 2001); N.Y. Crim. Proc. Law § 400.27 (LEXIS through Ch. 560, Dec. 12, 2001); N.C. Gen. Stat. § 15A-2000 (LEXIS through 2000 Legis. Sess.); Ohio Rev. Code Ann. §§ 2929.03 – 2929.05, 2929.022 (LEXIS through Oct. 24, 2001); Okla. Stat. tit. 21, §§ 701.9 – 701.13 (LEXIS through 2001 Supp.); Or. Rev. Stat. §§ 163.095, 163.150 (LEXIS through Aug. 1, 2000); 42 Pa. Cons. Stat. § 9711 (LEXIS through 2001 Pa. Act 77 June 26, 2001); S.C. Code Ann. §§ 16-3-20, 16-3-25 (LEXIS through 2000 Legis. Sess.); S.D. Codified Laws §§ 23A-27A-1 – 23A-27A-6 (LEXIS through 2001 Spec. Legis. Sess.); Tenn. Code Ann. §§ 39-13-202 – 39-13-204 (LEXIS through 2001 Legis. Sess. 102nd Gen. Assemb.); Tex. Penal Code Ann. § 19.03 (LEXIS through 1999 Legis. Sess.); Tex. Crim. Proc. Code Ann. art. 37.071 (LEXIS through 2001 Legis. Sess.); Utah Code Ann. §§ 76-3-206 – 76-3-207 (LEXIS through 2001 2nd Spec. Legis. Sess.); Va. Code Ann. §§ 19.2-264.2 – 19.2-264.4 (LEXIS through 2001 legislation); Wash. Rev. Code §§ 10.95.020 – 10.95.080 (LEXIS through 2001 3rd Spec. Legis. Sess.); Wyo. Stat. Ann. §§ 6-2-101 – 6-2-102 (LEXIS through 2001 Legis. Sess.).

36. *See* Ariz. Rev. Stat. Ann. § 13-703 (West & West Supp. 2001); Colo. Rev. Stat. § 16-11-103 (LEXIS through 2001 Legis. Sess.); Idaho Code § 19-2515 (LEXIS through 2nd Legis. Sess. 55th Legis.); Mont. Code Ann. §§ 46-18-301 – 46-18-306 (LEXIS through 2001 legislation); Neb. Rev. Stat. Ann. §§ 29-2520 – 29-2523 (LEXIS through 2001 Legis. Sess.). The others allow the jury to render a non-binding "advisory recommendation" regarding the choice between the death penalty and a life sentence. *See* Ala. Code §§ 13A-5-43 – 13A-5-52 (LEXIS through 2001 Legis. Sess.); Del. Code Ann. tit. 11, § 4209 (LEXIS through 2001 Legis. Sess. 141st Gen. Assemb.); Fla. Stat. § 921.141 (LEXIS through 2001 Legis. Sess.); Ind. Code. Ann. § 35-50-2-9 (LEXIS through 2001 Legis. Sess.).

inherent attack on the capital sentencing systems in virtually every other jurisdiction in this Nation.[37] Nothing in this Court's decisions supports such an argument.

At bottom, the State's argument confuses policy with the requirements of the Constitution. The State is of course free to argue that capital sentencing by the court is preferable to such sentencing by a jury, and nothing in the Constitution prevents a State from enacting a system reflecting that policy decision. What the Sixth and Fourteenth Amendments do not allow, however, is the removal of constitutionally required fact-finding functions from a jury, even if a State believes that its system of criminal justice will be thereby made fairer or more efficient. The Framers made that choice in favor of jury trial, and Arizona is simply not free to abrogate that constitutional decision as a matter of its own public policy.

37. Capital punishment in the federal system is generally governed by the Federal Death Penalty Act of 1994, Pub. L. No. 103-322, tit. VI, 108 Stat. 1796, 1959-82, *codified as amended at* 18 U.S.C. §§ 3591-3598 (LEXIS through Pub. L. No. 107-136). The federal Act specifies aggravating and mitigating circumstances to be considered in determining whether the death penalty should be imposed following conviction for enumerated offenses. *See id.* §§ 3591-3592. Under the federal statute, the task of determining whether any aggravating factor exists must be given to a jury (either the trial jury or one convened for the purpose), unless the defendant requests otherwise and the government accedes to the request. *See id.* § 3593(b). The jury's finding with respect to any aggravating factor "must be unanimous," and "[i]f no aggravating factor . . . is found to exist, the court shall impose a sentence other than death authorized by law." *Id.* § 3593(d).

CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed insofar as it affirms the death sentence imposed on petitioner.

Respectfully submitted,

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